

1 in your mind that a response, either as of the date of the  
2 letter or the date of your response, would be sufficient in  
3 terms of responding to the Commission.

4 A I wasn't in a position of second-guessing what the  
5 Commission exactly wanted. I think that's why they asked  
6 that question and responded that way.

7 Q Turning back to WTB Exhibit 6, Mr. Kay --  
8 actually, Mr. Kay, turn to WTB Exhibit 7. Mr. Kay, was this  
9 letter written on your behalf by Brown & Schwaninger?

10 A Yes.

11 Q Did you have receive this letter on or shortly  
12 after May 25, 1994?

13 A I believe so.

14 Q Okay.

15 Q Do you read the letter when you received it?

16 A I only asked and answered it, read it, to some  
17 degree.

18 Q Was there anything in this letter that you found  
19 objectionable, that you disagreed with?

20 A Please repeat your question.

21 Q Sure. Was there anything in this letter that you  
22 disagreed with or found objectionable?

23 A I don't recall having read through it that  
24 thoroughly to have made that determination.

25 Q Okay. Do you recall if you reviewed this letter

1 priority it being filed with the Commission?

2 A No, I do not.

3 Q Just to clarify, is it your recollection you did  
4 not review it prior to its being filed, or you don't recall  
5 one way or the other?

6 A I don't recall.

7 Q Mr. Kay, please direct your attention to WTB  
8 Exhibit Number 8. Do you recall receiving this letter on  
9 shortly after May 26, 1994?

10 A It was sent to my attorney. I believe it was  
11 transmitted to me.

12 Q And when you received the letter, did you read it  
13 when you received it?

14 A I would have rescanned it over.

15 Q Okay.

16 Q Mr. Kay, please direct your attention to WTB  
17 Exhibit Number 9.

18 A Yes.

19 Q Is this a letter sent on your behalf by your  
20 attorneys?

21 A Yes.

22 Q And your attorney was authorized to write this  
23 letter on your behalf?

24 A Yes.

25 Q Did you review this letter or acquire a version of

1       this letter prior to it being filed with the Commission?

2           A     I don't recall.

3           Q     Okay.

4                   JUDGE CHACHKIN:  You were supplied with a copy of  
5       this letter by your counsel at or about the time that it was  
6       submitted to the Commission.

7                   THE WITNESS:  Yes, I would have been.

8                   BY MR. SCHAUBLE:

9           Q     And did you read the letter after receiving it?

10          A     I only scanned through it.

11          Q     Okay.  Do you recall objecting to or disagreeing  
12       with anything in this letter?

13          A     I don't know that I read it in that great a detail  
14       to object.

15                   JUDGE CHACHKIN:  But did you, in fact, make known  
16       to your counsel that you disagreed with what he had stated  
17       in this letter?

18                   THE WITNESS:  May I read through it?  It's all  
19       legal arguments that my counsel made, and I don't recall  
20       having told them one way or the other because I'm not a  
21       lawyer to say whether the legal arguments are valid or not.

22                   BY MR. SCHAUBLE:

23          Q     Okay.  Mr. Kay, please direct your attention to  
24       WTB Exhibit Number 10.  This is a letter addressed to your  
25       counsel.

1           A     Yes.

2           Q     And do you recall receiving this letter on or  
3     shortly after May 27, 1994?

4           A     It would have been forwarded to me by my counsel.

5           Q     Okay. Turning your attention to the fourth  
6     paragraph on page one, the paragraph that starts with  
7     "regarding the request for the" --

8           A     Yes.

9           Q     Did you understand in that paragraph that the  
10    Commission was representing to you that it would not  
11    disclose your proprietary business information unless it was  
12    required by law to do so?

13          A     That's what it says.

14          Q     Okay.

15          A     Nobody is required by law.

16          Q     Okay. And do you see it also says that the  
17    Commission's intent was not to divulge proprietary business  
18    information to non-Commission personnel?

19          A     That conflicts with to a degree -- just reading  
20    here, that conflicts with sentence one, where it says "be  
21    required by law to do so." In a prior letter they quoted  
22    the Freedom of Information Act rules, and I'm already  
23    familiar with how that works. So if they had to reduce it  
24    under the Freedom of Information Act, by operation of law,  
25    their intent not to divulge is meaningless.

1 Q Mr. Kay, please direct your attention to WTB  
2 Exhibit Number 11.

3 A Yes.

4 Q Turning to the last page of the exhibit, the  
5 declaration --

6 A Yes.

7 Q -- is that your signature on the last page?

8 A Yes, it is.

9 Q Okay. And you signed this declaration on June 2,  
10 1994.

11 A Presumably.

12 Q Did you review this, this letter, prior to signing  
13 the declaration?

14 A I would have read or at least scanned through it  
15 before signing it to looking for anything that would have  
16 been incorrect.

17 Q And at the time you signed the declaration, did  
18 you believe that everything in the declaration was true and  
19 correct to the best of your knowledge?

20 A I could only certify to the factual information  
21 that would be within the scope of my knowledge --

22 Q Okay.

23 A -- contained in there, and I would have not have  
24 signed the declaration if I detected any errors.

25 Q Okay.

1 A Correct.

2 Q Turn to the paragraph numbered one on page one.

3 A Yes.

4 Q Is it correct as of this date that you did not  
5 operate any station other than those licensed to yourself,  
6 Buddy Corp., and Oat Trunking Corp., Inc.?

7 MR. SHAINIS: Objection as to relevancy.

8 MR. SCHAUBLE: Your Honor, he makes a direct  
9 representation here as to that they were entitled to attest  
10 to that representation.

11 JUDGE CHACHKIN: The objection is overruled.

12 THE WITNESS: You're talking about paragraph one  
13 here? You're referring to the whole paragraph, or are you  
14 referring to --

15 MR. SCHAUBLE: I'm referring to the paragraph as a  
16 whole.

17 THE WITNESS: Okay. The first part is perfectly  
18 correct, as far as I can tell even today. Mr. Kay states  
19 that he does not operate any station of which either he or  
20 the two above-named corporations is not the licensee, that  
21 gives us what we define as operate. I don't think it was  
22 operating a cellular telephone then, which I guess you could  
23 call it station. That would be licensed to someone else.

24 I think the operative word there is "operate."  
25 I've read this recently and look at this, and I believe that

1       that's correct, that it hinges on the definition of the word  
2       "operate," what constitutes operating.

3               MR. SCHAUBLE:   Okay.

4               THE WITNESS:   And also who is encompassed under  
5       the title "Mr. Kay," that it's referring to me personally,  
6       employees, or customers operating under their own licenses  
7       on repeater equipment that I rent to them?  I think it's  
8       subject to interpretation, if that's what you are looking  
9       at.

10              BY MR. SCHAUBLE:

11             Q       Well, let me ask you, Mr. Kay.  At this time isn't  
12       it true that you are operating stations licensed to Marc  
13       Sobel?

14             A       I was managing stations for Mr. Sobel.  I don't  
15       know if that's defined as operating.  As to whether I myself  
16       keyed up transmitters and activated stations by Mr. Sobel.

17             Q       Let me ask you this way.  On June 2, 1994, what  
18       was your understanding of the meaning of the word "operate"  
19       as used in that sentence?

20              MR. SHAINIS:   Objection.  His understanding of  
21       what the word "operate" means is totally irrelevant.

22              JUDGE CHACHKIN:  Are you going to ask him how he  
23       -- do you want to know what he understood the word "operate"  
24       when he answered the question?

25              MR. SCHAUBLE:   Yes.

1           MR. SHAINIS: Your Honor, but he is not the one  
2           who is answering the question. I mean--

3           MR. SCHAUBLE: Yes. He declared that everything  
4           in here was true and correct. This is factual; this is not  
5           legal argumentation.

6           JUDGE CHACHKIN: When he reviewed the document and  
7           stated that the information there was true and correct, what  
8           was his understanding of the word "operate" in response to  
9           the Commission question? Mr. Kay, if you could answer that  
10          question, please.

11          THE WITNESS: Was that a question posed to me?

12          JUDGE CHACHKIN: Yes.

13          THE WITNESS: My attorney wrote this, and I  
14          scanned through this letter. "Does not operate any stations  
15          that I owned, was licensed for, operated as a commercial  
16          business for myself personally or was responsible for the  
17          station," that it was mine, when I'm saying "operate" here.  
18          I certainly didn't pick this apart when I read this letter.

19          JUDGE CHACHKIN: By "operate," you were talking  
20          about with stations that you own.

21          THE WITNESS: Correct, that I operated as a  
22          licensee, as a business, or myself personally.

23          JUDGE CHACHKIN: Let's take a luncheon recess  
24          until one-fifteen.

25          (Whereupon, at 12:05 p.m., a luncheon recess was



1 taken.)

2

## A F T E R N O O N   S E S S I O N

(1:20 p.m.)

BY MR. SCHAUBLE:

Q     Good afternoon, Mr. Kay. So, if I recall, your belief that as of June 2, 1994 you were not operating stations licensed to Marc Sobel because they were licensed to Mr. Sobel as opposed to yourself.

A     Reflecting back on this, I don't believe I paid a great deal of attention to dissecting this letter at that time, and this one particular sentence doesn't strike me as having been paid any particular import at the time. Looking at it today, I would probably have worded it differently to make it clearer, but these words are my counsel's, not mine.

Q     Okay.

A     Where it says "does not operate any station," either he or the above-named corporations is not the licensee. I'd have to go into my attorney's mind as to exactly what he meant there by that, but it implies -- my assumption is, because the only thing I can assume, is that I operated only my own stations and those of my two -- in the meaning of the word "operate."

Q     Okay. Let me ask you this. Sitting here today, based on your present understanding, do you believe that statement was true and correct at this time?

A     I don't believe that it was untrue. Therefore, I

1     guess you would say it's true. To the extent that I looked  
2     at it, that I only operated, as far as what I define as  
3     operating a station, then I only operated my stations. I do  
4     not believe I thought of the stations that I manager or  
5     community repeater operators, where I provided service to  
6     others on, or where we rent hardware to other people, as  
7     falling within the context of my operating them.

8           Q     Okay. It's true, according to the paragraph on  
9     the end of page one going on to page two, --

10          A     Right.

11          Q     -- you make a reference that the letter to  
12     community repeater equipment and the leasing of radio  
13     equipment. Correct?

14          A     Correct.

15          Q     Okay. Is it true that in this letter you did not  
16     make any reference to management agreements or manage  
17     stations' license to others?

18          A     My lawyers do not. I did not author this letter,  
19     and, frankly, I looked for errors, not omissions, if it  
20     could even be considered to be an omission, for not  
21     mentioning them. That's very much debatable there if it was  
22     even an omission.

23                   I think leasing the equipment and operating  
24     community repeaters are both forms of my providing equipment  
25     to others and/or -- there is not a whole a lot of difference

1     between running a community repeater and having a management  
2     agreement for a station. It's the same principle, where I  
3     would supply equipment and provide services to others, but  
4     that I am not the licensee.

5           Q     And now at this time is it correct, Mr. Kay, that  
6     you were managing a station licensed to Vincent Cordaro?

7           A     I did not have a management agreement with him at  
8     that time in writing. I had a verbal agreement by which I  
9     would provide equipment to him that he would use it, and it  
10    was licensed as an SMR. It becomes a characterization as to  
11    whether or not my agreement characterized as a management  
12    agreement. For lack of anything else you can call it that,  
13    but I do not know if we ever applied those words to it.

14          Q     Okay.

15          A     It was an agreement verbally that I had with the  
16    man.

17          Q     And at this time is it correct that you had an  
18    agreement with Jerry Gales under which you managed one of  
19    those station licenses to him?

20          A     I don't know. I'd have to look back at when  
21    Gales' license was granted and when it was constructed  
22    whether it existed at that time or not. I don't remember.

23          Q     Okay. Now, with respect to the station, Mr.  
24    Sobel's station, stations licensed to Mr. Sobel and the  
25    stations licensed to Mr. Cordaro, it's true that you

1 provided the equipment for those stations. Correct?

2 A Yes.

3 Q And, in point of fact, it was also your customers  
4 who were operating on those stations. Correct?

5 MR. KELLER: Your Honor, I just wanted to  
6 interject. I thought Mr. Schauble represented this morning  
7 that we were not going to duplicate material that's in the  
8 transcript --

9 MR. SCHAUBLE: I'm just trying to briefly run it  
10 through, Your Honor, just to focus the --

11 JUDGE CHACHKIN: I'll overrule it.

12 MR. SCHAUBLE: I don't intend to go into this in  
13 any detail.

14 THE WITNESS: Not exclusively. Not entirely.

15 BY MR. SCHAUBLE:

16 Q But is it correct that the majority of the  
17 customers on those stations were --

18 A -- customers that I billed. Therefore, you would  
19 call them my customers, even if referred by other radio  
20 shops. They were mine as far as repeater service customers,  
21 yes.

22 Q Okay. And it's correct that any revenues charged,  
23 any revenues that came in from these stations, went into  
24 your bank account. Correct?

25 A Well, the customers I billed, I received the money

1       for.

2           Q       Okay. And is it correct that you had a role in  
3       maintaining the equipment that was used in connection with  
4       those stations?

5           A       Do you mean did I go up and fix them personally?  
6       Is that what you are asking me?

7           Q       I'm not asking if you personally did it, but if  
8       you were responsible for ensuring that that -- that any  
9       needed maintenance took place.

10          A       To a degree.

11          Q       Okay.

12                 JUDGE CHACHKIN: What do you mean "to a degree"?

13                 THE WITNESS: I mean I've been personally involved  
14       in it. Mr. Sobel, for example, checked his own stations  
15       himself on many occasions. I checked my own stations. I  
16       checked his. He checked mine. Many things Mr. Sobel could  
17       do, he would do completely independently and without my  
18       knowledge.

19                 If a customer called and said there was a failure,  
20       my staff may not even inform me but simply contacted Mr.  
21       Sobel to have him check it, when you're saying me being  
22       responsible for maintenance, it varied on occasion. My  
23       estimate is might have been in the loop 50 percent of the  
24       time.

25                 MR. SCHAUBLE: Okay. Let me ask you this.

1           THE WITNESS: A lot of it, I may not even have  
2 known about.

3           BY MR. SCHAUBLE:

4           Q     Okay. Mr. Sobel performed maintenance work both  
5 with respect to stations licensed to himself and stations  
6 licensed to you. Correct?

7           A     And community repeaters and ones licensed to  
8 customers. Basically if it was on a hill top, Mr. Sobel  
9 would go fix it. If it was at a customer's office, he would  
10 go fix it. He is a radio technician. That's what he does.

11          Q     Okay. And when he would perform these functions,  
12 he would do so as a contractor who would charge you an  
13 hourly rate, and you would pay him at his hourly rate.  
14 Correct?

15          A     When he is working on my equipment, that was the  
16 case. That wasn't necessarily always the case. He did work  
17 for other people. He did work for himself. I don't know  
18 everything that Marc did.

19          Q     Okay. Just to clarify, when he is working on  
20 stations licensed to yourself, Buddy Corp., Oat Trunking  
21 Corp., or himself. I'm limiting the question to those  
22 stations.

23          A     When he worked on my stations licensed to me or  
24 Oat Trunking Corp., or Buddy Corp., or those stations for  
25 which I had a management agreement or management

1 understanding with Mr. Sobel, he billed me. Mr. Sobel  
2 oftentimes wore many caps, if you know what I mean.

3 He would go to a mountain top to service something  
4 that was licensed to him that I had no connection with  
5 whatsoever. He would work on that equipment, get done with  
6 it, walk over to the next rack, work on something that was  
7 licensed to him but managed by me, and then walk over to  
8 another rack and repair something that was a community  
9 repeater and work on yet another rack of equipment that was  
10 equipment licensed to me. It could be any combination of  
11 these.

12 The man would service anything and everything that  
13 needed to be serviced at a particular mountain top, and,  
14 through those, he could actually be working for himself,  
15 working for a customer, working for another radio shop, and  
16 working for me in some fashion, all in the same trip, and  
17 only he would know, and he would bill accordingly.

18 Q Turn to page five of --

19 JUDGE CHACKIN: What exhibit?

20 MR. SCHAUBLE: Exhibit 11, Your Honor.

21 BY MR. SCHAUBLE:

22 Q And turning to the sentence at the bottom of that  
23 page, and about one, two, three, four, five, seven, and it's  
24 the sentence that begins: "The Commission's recent demand  
25 that Mr. Kay's case applied to the Commission with 50 copies



1 of his letter dated April, 1994, coupled with its demands  
2 that he supply the Commission with 50 copies of the constant  
3 response, calls into question serious doubt for Mr. Kay the  
4 Commission's intent to honor his request for  
5 confidentiality." Do you see that sentence Mr. Kay?

6 A Yes.

7 Q Is that a correct statement of what you believed  
8 at the time of this letter?

9 A Yes.

10 Q Now, Mr. Kay, you understood that the Commission  
11 had told you that it wouldn't release these materials unless  
12 it was required to do so by law. Correct?

13 A Yes.

14 Q Okay. At this time, did you believe the  
15 Commission should keep the materials confidential even if  
16 the law required that they be released to others?

17 A I know from past experience with the Commission  
18 that with extremely sensitive material the Commission has  
19 permitted licensees to loan but not submit material to the  
20 Commission. Therefore, the material never becomes the  
21 property of the Commission and is then returned. I had past  
22 experience with the Commission of submitting confidential  
23 materials to them, including highly sensitive, competitive  
24 material, which was handled by the Commission on that basis  
25 and was returned to me. I knew how it was handled when it

1     was handled properly.

2           Q     Did you ever ask that this procedure be followed  
3     in this case?

4           A     We requested confidentiality in basically the same  
5     fashion this time, my attorneys did, as was handled in, I  
6     think it was somewhere around mid-'93, when I requested  
7     confidentiality up front, and they said yes. And I said,  
8     okay, I'll submit it. You're free to read it for the  
9     record, and please return.

10           And the material was marked copyright,  
11     proprietary, confidential, and its return was requested, and  
12     the material was returned by the Commission, and it worked  
13     fine about six months or seven months previous to the  
14     308(b). So I have experience with that. This time they  
15     denied confidentiality, then they wanted 50 copies, then  
16     they quoted FOIA language to me. What do you want me to  
17     believe?

18           Q     Mr. Kay, are you aware of any writing in which the  
19     Commission denied your request for confidentiality?

20           A     Yes. I believe it exists. I haven't seen it in  
21     the last few days, but my belief is it exists, and we have  
22     it.

23           MR. SCHAUBLE: Okay. I have not seen any such  
24     thing, Your Honor.

25           JUDGE CHACHKIN: What's the basis for your belief?

1           THE WITNESS: It is my recollection that a request  
2     by my attorneys for confidentiality, which is one of the  
3     missing documents here, and I believe that in one of these  
4     documents that we just looked at today, it says where they  
5     denied my request for confidentiality is part of one of my  
6     attorney's letters -- I saw it in one of the paragraphs of  
7     these documents that we are reviewing. I can probably find  
8     it in here if you want me to find it.

9           JUDGE CHACHKIN: Why don't you?

10          THE WITNESS: Sure.

11          (Pause.)

12          THE WITNESS: It is on WTB Exhibit Number 3, page  
13     five of seven, the first full paragraph. "In its letter to  
14     Mr. Kay, dated March 1, 1994, the Commission declined to  
15     provide Mr. Kay with any assurance that it would treat any  
16     customer information which he submitted with strict  
17     confidence."

18          JUDGE CHACHKIN: And you have that March 1st  
19     letter?

20          MR. KELLETT: I'll look around, Your Honor.

21          JUDGE CHACHKIN: Continue.

22          MR. SCHAUBLE: Thank you, Your Honor.

23          BY MR. SCHAUBLE:

24           Q     Mr. Kay, please turn to WTB Exhibit Number 12.

25           A     Yes.

1           Q     Do you recognize this as a letter from the  
2     Commission to your counsel?

3           A     Yes.

4           Q     Did you receive this letter on or shortly after --  
5     strike that. Was this letter forwarded to you by your  
6     attorneys on or shortly after June 10, 1994?

7           A     I believe that's correct.

8           Q     And when you received the letter, you read it?

9           A     I read it or scanned it. I don't remember the  
10    detail to which I paid to it.

11          Q     Okay. Turning to the third paragraph on page one,  
12    Mr. Kay, in regard to Item 5, "information submitted will be  
13    kept confidential by the Commission and only one original  
14    and one copy of the information need be filed," do you see  
15    that?

16          A     Yes.

17          Q     Okay. So you understood at that point in time  
18    that the Commission was no longer requesting 50 copies of  
19    the information. Correct?

20          A     That's what it says.

21          Q     Okay. And you also -- is it correct that this  
22    statement does not impose any sort of conditions or  
23    qualifications on the statement that the information will be  
24    kept confidential?

25               MR. SHAINIS: Objection. The letter speaks for

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1       itself.

2               JUDGE CHACHKIN: Sustained, unless this is  
3       introduction to a question.

4               MR. SCHAUBLE: I'll move on, Your Honor.

5               BY MR. SCHAUBLE:

6               Q       And did you also understand that the Commission  
7       was modifying its request for a user list so that instead of  
8       requiring the information as of January 31, 1994, that the  
9       information would be provided as of any date subsequent to  
10      January 1, 1994, which was convenient to you?

11              MR. SHAINIS: Objection. The letter speaks for  
12      itself.

13              JUDGE CHACHKIN: Sustained.

14              MR. SCHAUBLE: Okay.

15              BY MR. SCHAUBLE:

16              Q       Mr. Kay, please turn to WTB Exhibit Number 13.  
17      Was this letter written on your behalf by your lawyers?

18              A       Yes.

19              Q       Okay. Did you see a copy of this letter on or  
20      shortly after June 17, 1994?

21              A       I believe that would be correct.

22              Q       And when you received it, did you read it?

23              A       I would have read it or scanned through it.

24              Q       Okay. Did you see this letter or a prior version  
25      of this letter prior to being filed with the Commission?

1           A     I don't recall.

2           Q     Okay. When you read or scanned the letter, do you  
3 recall seeing anything in here which you objected to or  
4 disagreed with?

5           JUDGE CHACHKIN: You're talking about at that  
6 time.

7           MR. SCHAUBLE: At that time.

8           THE WITNESS: It again is filled with legalese and  
9 references by attorney's attempts to extract from the  
10 Commission the Freedom of Information Act litigation to find  
11 and obtain copies of the complaints which were referenced in  
12 the 308(b) letter. So I don't think there was anything I  
13 injected into it. It was my lawyers handling the problem,  
14 handling the situation.

15          BY MR. SCHAUBLE:

16          Q     There was nothing in this letter you disagreed  
17 with or found wrong at that time. Correct?

18          A     I'm not a lawyer. If there was something wrong  
19 with it that I should have agreed with it, I did not know  
20 what it was, so I don't recall having found anything either  
21 that I found particularly disagreeable that I recollect.

22          Q     Okay. Mr. Kay, please direct your attention to  
23 WTB Exhibit Number 14. Was this letter forwarded to you by  
24 your attorneys on or shortly after June 22, 1994?

25          A     It probably was. There is no reason to doubt that

1 it was.

2 Q Okay. When you received it, did you read the  
3 letter?

4 A I would have read or scanned through it.

5 Q Turn to WTB Exhibit Number 15. First, on page  
6 four of the document, Mr. Kay, --

7 A Yes.

8 Q -- on the declaration, is that your signature?

9 A Yes, it is.

10 Q And you signed the declaration on June 30, 1994.

11 A I would presume so.

12 Q Mr. Kay, did you understand at the time this  
13 letter was being filed with the Commission that you were  
14 declining to provide the information, the information it was  
15 directing you to provide?

16 MR. SHAINIS: Objection. The letter speaks for  
17 itself.

18 MR. SCHAUBLE: I just want to nail it down.

19 JUDGE CHACHKIN: Is this a preamble to a question,  
20 another question, or what; or are we just stating what the  
21 letter states?

22 MR. SCHAUBLE: Your Honor, I just want the record  
23 clear to determine that it was his intention to --

24 MR. SHAINIS: Your Honor, I don't think there is  
25 any ambiguity in the record. The letter speaks for itself.

1 JUDGE CHACHKIN: Unless you want to use this as an  
2 introduction to another question. You apparently don't.

3 MR. SCHAUBLE: Let me ask the question another  
4 way, Your Honor.

5 JUDGE CHACHKIN: All right.

6 BY MR. SCHAUBLE:

7 Q Mr. Kay, at the time you sent the declaration, is  
8 there anything in this letter that you objected to or  
9 disagreed with?

10 MR. SHAINIS: The question has been answered.

11 MR. SCHAUBLE: Not with respect to this letter.

12 JUDGE CHACHKIN: Well, if he -- that question is  
13 you -- necessarily because here he signed the declaration to  
14 the truthfulness of the letter. It's not a situation where  
15 the lawyers sent the letter and there is no declaration.  
16 Here there is a declaration, so you don't have to inquire  
17 further as to his responsibility for the letter. Now, if  
18 you have some followup questions, then go ahead, but if all  
19 you want to do is reaffirm that the letter, he signed the  
20 declaration; that's with the letter.

21 MR. SCHAUBLE: Very well, Your Honor. Your Honor,  
22 for the record, there was a discussion this morning  
23 concerning 90.443(a), the Station Records Rule, and we  
24 wanted to clarify one thing for the record --

25 JUDGE CHACHKIN: Go ahead.



1           MR. SCHAUBLE: -- that 90.443(a) of the rules  
2     requires for all stations results and dates of transmitting  
3     measurements required by 90.215 of this part and the name of  
4     person or persons might measurements.

5           If you go back to 90.215 of the rules, and  
6     90.215(a) says: "The licensee of each station shall employ  
7     a suitable procedure to determine if the carrier frequency  
8     of each transmitter authorized to operate with an output  
9     power in excess of two watts is maintained within the  
10    tolerance prescribed of 90.213. This determination shall be  
11    made and the results entered is in the station records in  
12    accordance with the following," subparagraph 1, "when the  
13    transmitter is initially installed."

14           So the maintenance records explicitly require  
15    information going back to the time when the transmitter was  
16    initially installed.

17           JUDGE CHACHKIN: Well, you can make your argument.  
18    If the witness wants to explain it, you can ask him  
19    questions about it. It's up to you.

20           MR. SCHAUBLE: Okay.

21           (Pause.)

22           MR. SCHAUBLE: Mr. Kay, here is 4 CFR, revised as  
23    of October 1, 1993, and I'd direct your attention to Section  
24    90.215, entitled "Transmitter Measurements."

25           THE WITNESS: Okay.

1 MR. SCHAUBLE: Please take a minute to review that  
2 rule.

3 (Pause.)

4 THE WITNESS: Okay.

5 BY MR. SCHAUBLE:

6 Q Do you see that that rule requires certain types  
7 of measurements to be taken?

8 A Yes.

9 Q Did you, in fact, make the measurements required  
10 by those rules?

11 A We tested and tuned the equipment, but the way we  
12 did it does not lend itself to this type of bookkeeping,  
13 record keeping, which is, I think, where the problem is.

14 Q Okay.

15 A Because we did all our work anywhere from a week  
16 to months before installation, all the measurements that  
17 would have been made and tested and alignments on the  
18 transmitters was done well before installation. It was not  
19 done on site at the time it was installed on a rack on a  
20 mountain top. We didn't do it that way. That's the way it  
21 used to be done years ago by many companies and many  
22 manufacturers of equipment, but it isn't the way we do it.

23 Q Okay. Now, turn, Mr. Kay, to 90.443(a); and, Your  
24 Honor, may I approach the witness to assist?

25 A I think I can look it up, John. I think I can

1 handle that. "Content of Station Records."

2 Q Yes.

3 A Okay.

4 Q Do you see subparagraph --

5 A Yes.

6 Q -- that refers to keeping station records of --  
7 and dates of transmitting measurements required by 90.215?

8 A I read exactly what it says.

9 Q Okay. And did you keep records as required by  
10 90.443?

11 A In this fashion? No.

12 Q Okay.

13 JUDGE CHACHKIN: What records did you keep about  
14 that?

15 THE WITNESS: Well, it goes to how we prepared the  
16 equipment for use, Your Honor. Would you like for me to  
17 explain it to you how we did it? I will.

18 JUDGE CHACHKIN: Go ahead, go ahead.

19 THE WITNESS: Well, we would order in transmitters  
20 from a factory. Whether it was Kenwood or Evenden doesn't  
21 really matter. They would come in, they are programmable  
22 equipment as a rule. They are untuned. They are not  
23 assigned to a frequency. They are untested. They come in a  
24 box raw to us.

25 What we would do is take them from their box. We

1 would pick a test frequency for them. We would align them,  
2 tune them, set the power levels, convert them into the type  
3 of equipment that we wanted and would use. Fully set up,  
4 but only on a test frequency; through those, it didn't have  
5 a call sign. It wasn't part of the station. It wasn't part  
6 of the station record. It was nothing more than -- much  
7 like an automobile without a license plate.

8 The license plate would be the equivalent of a  
9 call sign. It was ready to go. It could be used anywhere  
10 once it was tuned up and was then sat on our shelf. When  
11 we needed to put up a repeater on a WIKI-123 picking a call  
12 sign, myself or a technician would go back to our tech room,  
13 grab one of these already prepared repeaters, already tuned,  
14 already tested, already aligned, put the frequency into it  
15 by a computer hose. He didn't need to test anything.

16 He would then take this already programmed piece  
17 of equipment up and install it on a rack. There was no  
18 tuning, no alignment, no adjustment needed. It had already  
19 been done anywhere from weeks to months previously, but we  
20 did not know -- there was never a correlation between what  
21 piece of hardware we used on the shelf in connection with  
22 the station.

23 If we had a repeater fail on a mountain top and  
24 from testing down below we suspected that it could be  
25 something that would require major repair, our practice

1 would be to take would have these already tuned, already  
2 prepared that had no call sign assigned to it, hose it with  
3 the computer, put its frequency in, take it up to the hill.  
4 If we could repair the one that was up there readily, like a  
5 fuse or something silly, we did.

6 If it blew something major, we pulled that piece  
7 of equipment, take the new one, plug it in, hook it up, and  
8 take the old one back down, which would be recycled and  
9 shoved onto a shelf, which means we would have, I guess you  
10 would call it, merry-go-chairs with the repeaters. So one  
11 particular piece of hardware was never, ever assigned, as a  
12 rule to any particular call sign or any particular station  
13 or any particular frequency.

14 We would rotate these things continuously through.  
15 It's almost like running a bus route. You always have a bus  
16 running the route, but it may not necessarily be the same  
17 bus. The same idea we ran with the repeaters here, which,  
18 fine, maybe we should have done something better on  
19 maintenance records. But with the way we were doing it, we  
20 couldn't assign a particular piece of hardware by model and  
21 serial number of to a call sign because they never stayed  
22 that way.

23 Motorola, on the other hand, in the olden days,  
24 they had this huge cabinet, anywhere from three- to six-feet  
25 tall, and weighed 300 pounds -- the guys rolled it in on a

1 furniture dolly, and sat the thing down. They would put it  
2 on site, anchor the thing down. That thing would stay there  
3 forever. That would be that station with that frequency and  
4 that call sign set up from the factory, and a couple or  
5 three years ago I saw how they used to keep their station  
6 log.

7           They used this little, flip-open spiral book which  
8 they tossed in the bottom of the cabinet, which was fine  
9 because they had a physical cabinet that would stay there  
10 with this hardware, whereas we did not. We used racks where  
11 we installed several repeaters in there. There simply  
12 wasn't a place for something like that. I suppose we could  
13 have made something; we just didn't think about it.

14           The rule keeping here versus the way we did it,  
15 see, there wasn't compatibility. Now, maybe that's an  
16 excuse, but it didn't fit the way we were going it, and we  
17 couldn't find a practical way around the it, or that met our  
18 needs that we needed the way we did things. So that's all I  
19 can tell you.

20           JUDGE CHACHKIN: All right. Thank you.

21           MR. SCHAUBLE: Your Honor, may I approach the  
22 witness?

23           JUDGE CHACHKIN: Sure. So do I understand what  
24 you are saying you had no way to supply the information that  
25 the Commission wanted -- is that what you are saying? --

1 concerning the date that you requested?

2 THE WITNESS: Well, they wanted maintenance  
3 records.

4 JUDGE CHACHKIN: No. They wanted information as  
5 to --

6 MR. KELLER: -- construction data.

7 JUDGE CHACHKIN: -- construction data.

8 THE WITNESS: Well, we, in fact, did provide them  
9 a tremendous amount. We had already told them on 800(a)'s  
10 which is something we had to answer and on an ongoing basis.  
11 Whenever they sent us an 800(a), which they sent them to me  
12 for years, we always answered them and told the construction  
13 date of those stations.

14 JUDGE CHACHKIN: And where did you get that data  
15 from to put it in these 800(a)'s?

16 THE WITNESS: When I installed 800-megahertz  
17 equipment with a base station, I knew I would get 800(a)  
18 letters. What I would do is jot down a note and stick it in  
19 a file that was by frequency, not by call sign, but I could  
20 find it when I needed it. I would then take that, put it on  
21 the 800(a) and discard my note, and as a rule, stick a copy  
22 of my 800(a) letter in my file, which ultimately I supplied  
23 all of the 800(a) copies I could find to the Commission.

24 So that's how I did it. I knew I was going to be  
25 asked. I knew they would want a date. The vast majority of

1 the times I had those notes. Other than that, I would look  
2 back on service records like when Mr. Sobel would bill me  
3 for going to a particular mountain top or a particular  
4 installation. Like on what day in May did we go to a  
5 particular site and construct such-and-such station?

6 Our memories are fairly good. We know when the  
7 grant date was. We installed usually fairly promptly after  
8 the grant dates. Oftentimes we would preconstruct it. We  
9 would keep preconstruct repeater, knowing that a grant is  
10 pending. We would put the repeater up there and leave it in  
11 turned-off mode electronically by remote control.

12 So when we did that, the construction a date was  
13 the grant date because it was already there. That's  
14 reflected on a number of the 800(a)'s that the grant date is  
15 the construction date.

16 JUDGE CHACHKIN: All right. Go ahead, Mr.  
17 Schauble.

18 MR. SCHAUBLE: Thank you.

19 BY MR. SCHAUBLE:

20 Q Mr. Kay, is it correct that as a general matter on  
21 land a mobile frequencies more than one licensee can share  
22 use of the same frequency?

23 A Yes, as a rule.

24 Q As a rule. However, it has also been correct that  
25 it would be possible under certain circumstances for a



1     licensee to obtain exclusive use of a frequency in a given  
2     area?

3           A     On certain frequencies, yes.

4           Q     Okay. And is it correct that an important  
5     consideration, that basic consideration in determining  
6     whether somebody gets exclusive use of frequency involve the  
7     loading they have on that frequency?

8           A     The loading that exists on the frequency, is  
9     service that the frequency is in, where other -- may be  
10    located on the channel geographically in accordance with a  
11    number of regulations and policies and coordination policies  
12    by the coordinators. There is no one single answer for that  
13    one.

14          Q     Okay. Just for the record, would you please give  
15    your understanding of the meaning of the term "loading"?

16          A     Loading is generally the number of mobile radios  
17    that a person has on a frequency.

18          Q     Now, is it correct that land mobile stations can  
19    be licensed for either conventional or trunk operation?

20          A     Yeah, or now ESMR.

21          Q     I'm going to be asking a series of -- the time  
22    frame for the questions that follow are going to relate to  
23    1994 and previously, just so you're clear on that, Mr. Kay.  
24    Now, in the 470-to-512-megahertz band is it correct that  
25    most of the licenses you hold and you held in the band prior

1 to that time period were stations licensed in the business  
2 radio service?

3 A I was only eligible in the business radio service,  
4 so, yes.

5 Q And during this time period, am I correct that a  
6 frequency was said to be fully loaded if there were 90 or  
7 more mobiles on a given frequency?

8 A Correct.

9 Q Okay. And it's correct, is it not, that if a  
10 particular frequency in a given area was licensed  
11 collectively for 90 mobile units, that no more applications  
12 would be accepted for licenses for stations in that area.  
13 Correct?

14 A It's a little more complex than that, I think.  
15 Could you try the question again? I'm going to try to  
16 answer you very specifically to your specific question.

17 Q Yeah. Okay. Is it correct that once a frequency  
18 is said to be fully loaded in an area, which in the business  
19 radio service in 470-to-512 band would be 90 mobile units,  
20 that applications from new licensees for stations in that  
21 area on that frequency would not be accepted?

22 Q Okay. I'll try to answer you this way. If you  
23 pick Point A, a location, a mountain top, a building top --  
24 it doesn't matter -- a set of geographic coordinates within  
25 a 50-mile radius of a Subpart L eligible city, you would

1 determine the availability of the channel by taking a  
2 40-mile radius of that desired application point, and if  
3 there are greater than the 90 mobiles licensed to any  
4 repeater facility within that 40-mile radius, then your  
5 application will be rejected.

6 A loading attributable to the stations within a  
7 40-mile radius also must be determined by the configuration  
8 of those stations as to whether or not they had one  
9 repeater, two repeaters, or more and their locations and to  
10 whether or not any of those stations were separated by  
11 greater than 40 miles, if that answers your question.

12 Q Now, to make the most simple case, Mr. Kay, if  
13 there was a station with a location, say Mountain top X --

14 A Okay.

15 Q -- and that station was licensed for 90 or more  
16 mobiles --

17 A You mean at the same location.

18 Q Same location. Applicant A wants to use Mountain  
19 top X, and all of the other licensees are at Mountain top X.

20 A Well, you would still have to take a look at the  
21 individual licenses for those people that are licensed at  
22 Mountain top X as to whether or not they had a Mountain top  
23 Y. You would have to examine each license on each frequency  
24 and individually detail them out.

25 Q Now, Mr. Kay, with respect to the 800-megahertz

1 band, for a conventional station, is it correct that the  
2 frequency would be considered fully loaded if there are at  
3 least 70 mobiles on the frequency --

4 A Conventional LMSER?

5 Q Yes, conventional 800 megahertz.

6 A That's what radio service? It's 50 on public  
7 safety, I believe.

8 Q Okay, okay. With respect to conventional business  
9 radio?

10 A This is land trans-USMR.

11 Q For those particular services it would be a 70.  
12 Correct?

13 A That was the operative number.

14 Q It's correct that if one licensee was licensed for  
15 the number of mobiles which would make that station fully  
16 loaded within the service, that that licensee would have  
17 exclusive use of the frequency within that given area.  
18 Correct?

19 A You have to take a look at the frequency itself  
20 and who is licensed on it as compared to individual  
21 licensees, but if you're trying to present a hypothetical of  
22 Licensee A is licensed for 70 or greater mobile units at a  
23 location and there are no other licensee around him anywhere  
24 in the area -- we won't take any other licenses into  
25 consideration as existing -- then he would normally have an

1 area of exclusivity for 70 miles or, depending on when, a  
2 3040 contour protection or a 2240 contour protection.

3 Except if he was on one of the major four mountain tops  
4 which add license for 1,000 ERP, which would afford him  
5 105-mile protection, or a 4030 or 4022 contour protection.

6 Q Present a situation, Mr. Kay, in which Licensee A  
7 on Mountain top X is licensed for a number of mobiles  
8 required which would provide exclusivity, has an exclusivity  
9 number.

10 A This would almost help if we had a chart and chalk  
11 board here. You are really getting into the nuts and bolts  
12 of things, but go ahead.

13 Q Okay. But Licensee B has already been -- is also  
14 licensed within the same area -- had been previously  
15 licensed in the same area for a number of, say, 30 mobile  
16 units --

17 A I'm getting fuzzy on this. I need a piece of  
18 scratch paper or something so I can figure this out. Start  
19 from the top here.

20 Q Licensee A is licensed for 100 units.

21 A Okay.

22 Q We also have a situation where Licensee B is  
23 licensed for 30 units.

24 A Are they at the same site?

25 Q Yes.

1           A     Okay.

2           Q     Now, it's correct that under that situation  
3     Applicant C could not come in and apply to use that  
4     frequency at the same site.

5           MR. SHAINIS:  Objection.  Your Honor, I'm not sure  
6     where Mr. Schauble is going with this.  If it's to test Mr.  
7     Kay's understanding of the Commission's rules by use of  
8     diagrams, for whatever limited value that may be, it seems  
9     that we have exceeded it at this point.

10          JUDGE CHACHKIN:  Where are we going, Mr. Schauble?

11          MR. SCHAUBLE:  Your Honor, we are about to start  
12     going through large number of loading records here, and I  
13     think a certain amount of background is needed in order to  
14     understand the questions that are following.  I'm almost  
15     done with this.

16          JUDGE CHACHKIN:  All right.  Go ahead.  What's  
17     your question?

18          BY MR. SCHAUBLE:

19          Q     My question is, in the situation where Licensee A  
20     has 100 units and Licensee B has 30 units at the same site,  
21     is it correct that Applicant C could not come in and apply  
22     to use that frequency at the same site?

23          A     Unless he got concurrence from the two existing  
24     licensees, in which case he could.

25          Q     But absent that consent, he could not.  Correct?

1           A     Normally, no. He might be able to get it with a  
2     concurrence from one of the licensees by splitting the count  
3     with one of the licensees.

4           Q     Now, Mr. Kay, is it correct that a frequency for  
5     which you have exclusive use is more valuable than a  
6     frequency which must be shared with others?

7           A     Valuable in what sense?

8           Q     Okay.

9           A     Value is in the eye of the beholder.

10          Q     Okay. Let me ask it this way. Is it correct that  
11     from a technical perspective there are advantages to  
12     operating on an exclusive frequency as opposed to operating  
13     on a shared frequency?

14               MR. SHAINIS: Objection. What do you mean by the  
15     use of the word "technical perspective"?

16               MR. SCHAUBLE: If the witness doesn't  
17     understand --

18               JUDGE CHACHKIN: Does the witness understand the  
19     question?

20               THE WITNESS: I'd prefer to have a frequency to  
21     myself, like we would all like to have the freeway to  
22     ourselves, of course.

23               MR. SCHAUBLE: Okay. And is it correct that as a  
24     general proposition that from the point of view of monetary  
25     value of licenses and stations that exclusive frequency are

1 more valuable than shared frequencies?

2 MR. SHAINIS: Objection as to relevance as to what  
3 difference does it make if it's more valuable or less  
4 valuable?

5 JUDGE CHACHKIN: Well, I think the answer is  
6 pretty obvious, that obviously -- what's the point?

7 MR. SCHAUBLE: Well, Your Honor, we are getting  
8 into -- there is -- I'm establishing --

9 JUDGE CHACHKIN: Well it's, first of all,  
10 financial. Isn't that -- Mr. Kay?

11 THE WITNESS: If at the same site under normal  
12 conditions, that would be correct. You can have a clear  
13 channel in Death Valley, and it's worth nothing. You have a  
14 shared channel that's nice and quiet at a major mountain-top  
15 site or the top of the Empire State Building in New York,  
16 and I'd say that one would be a whole lot more valuable.

17 JUDGE CHACHKIN: All things being equal, it's  
18 better to have an exclusive channel.

19 THE WITNESS: Of course.

20 BY MR. SCHAUBLE:

21 Q Now, are you familiar with the term "channel  
22 clearing," Mr. Kay?

23 A It's not a technical term, but it's one a lot of  
24 radio guys use.

25 Q Okay. Is it a term you have used in the past?



1           A     Channel clearing, channel acquisition.

2           Q     Okay. Housekeeping. You can call it a number of  
3 things. It amounts down to the same thing.

4           Q     Okay. Would you please give your understanding of  
5 what that term means?

6           A     Well, a radio operator, commercial radio operator,  
7 would seek an authorization on a shared channel. His  
8 objective then would be to make the maximum degree use of  
9 the channel. In doing so, he will examine the license  
10 records to find out who else is licensed on the channel with  
11 him and will obtain generally a printout of all the other  
12 licensees' licenses for his reference.

13                     If you can convince an existing licensee who is  
14 operating radios to come join on your repeater, you have one  
15 more customer who is paying you for air time on a channel  
16 instead of paying someone else. If you find a license that  
17 is nonoperational, because the licensee went out of business  
18 or changed systems or didn't ever construct -- there's 1,001  
19 reasons you're going to find an unused license out there.

20                     If you could find that licensee, you would ask him  
21 to cancel it, or you inform the Commission that Joe's  
22 Painting, for example, went out of business, and it's been  
23 going a couple of years, and the license should be canceled.  
24 And maybe in the year and a half, if you're lucky, the  
25 Commission might ask you to send some letters to Joe's